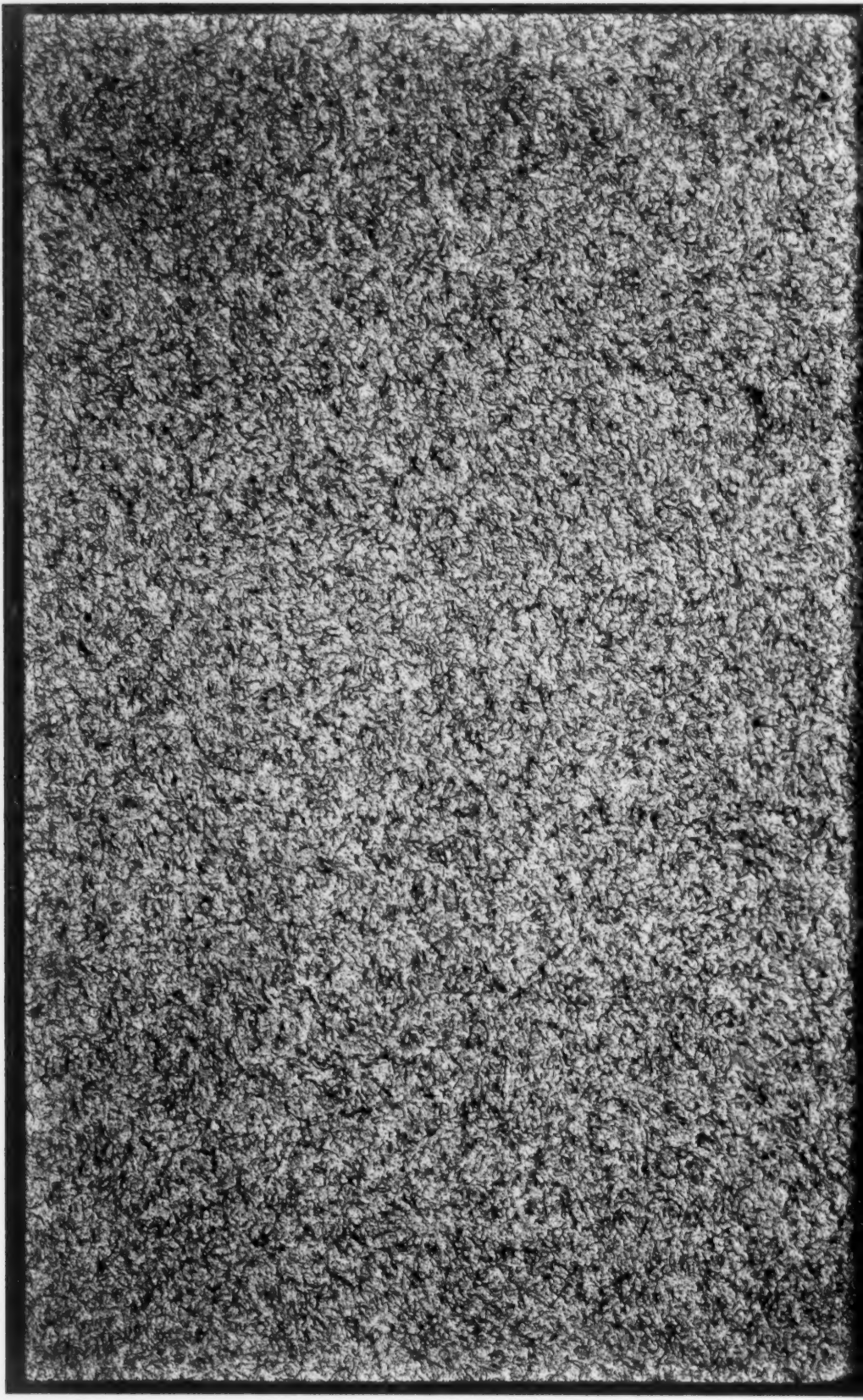

FILE COPY

NOV. 5 193[illegible]
[illegible] STATES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 193[illegible]

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF [illegible] HAL STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE [illegible] ASSOCIATES.

[illegible] OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

[illegible]

INDEX.

Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Statement of facts	2
Question presented	4
Specification of assigned errors to be urged	5
Statutes involved	6
Summary of argument	7

Argument:

I. The controlling factor in determining the provability of claims is whether Congress intended them to be provable. The amendments to the Bankruptcy Act of 1934 are legislative interpretations of the intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act of 1898. These amendments conclusively demonstrate that it was not the intent of Congress in enacting the original statute that a claim such as the present one be provable in bankruptcy 9

A. The intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act as legislatively interpreted by it in enacting Section 77B, sub-section (b), on June 7th, 1934 13

B. The intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act as legislative interpreted by it in amending Section 63 (a) on June 7, 1934, and by the further amendment of June 18, 1934..... 14

(1) The frame of the amendments to Section 63 (a) of June 7, 1934 17

(2) The Act of June 18, 1934, amending Clause (7), enacted June 7, 1934 20

(3) The proceedings in Congress preceding the Act of June 7, 1934 22

II. This Court in Manhattan Properties v. Irving Trust Co., supra, affirmed the doctrine long established by the lower Federal courts that claims for rent or damages consequent upon the abrogation of leases are not provable in bankruptcy. This doctrine is based not upon the language employed in the leases, but the essential nature of such claims 23

Page

III. The prescribed measure of damages is impossible of calculation and sounds in penalty 27

IV. The decision of the Circuit Court of Appeals for the Second Circuit should be reversed and the proof of claim of the respondents reduced to the sum of $1,648.70, representing the rent deficiencies and electric charges with interest thereon due at the time of the filing of the bankruptcy petition.... 32

TABLE OF CASES CITED.

Brown v. Irving Trust Co., 291 U. S. 320..... 9, 10
Central Trust Co. v. Chicago Auditorium Ass'n, 240 U. S. 581..... 23
Cope v. Cope, 137 U. S. 682..... 13
Dunbar v. Dunbar, 190 U. S. 340..... 28, 30
Gardner v. Butler & Co., 245 U. S. 603..... 24
Hermitage v. Levine, 248 N. Y. 333..... 32
In Re Metropolitan Chain Stores, Inc., Malavazos v. Irving Trust Co., 66 Fed. (2d) 482..... 29
In Re Roth & Appel, 181 Fed. 667..... 24
Irving Trust Co. v. A. W. Perry, Inc., 69 Fed. (2d) 90..... 3, 4
Kothe v. Taylor Trust, 280 U. S. 224..... 29
Lane v. Industrial Commissioner, 54 Fed. (2d) 338, certiorari denied on jurisdictional grounds, 286 U. S. 543..... 19
Manhattan Properties v. Irving Trust Co., 291 U. S. 320.....7, 9, 11
Maynard v. Elliott, 283 U. S. 273..... 17
Schall v. Camors, 251 U. S. 239 .....11, 12, 19
Seidlitz v. Auerbach, 230 N. Y. 167 ..... 29, 31
Watson v. Merrill, 136 Fed. 359 26
Wetmore v. Markoe, 196 U. S. 68..... 13

OTHER AUTHORITIES CITED.

Act of June 7, 1934 .....7, 14, 16, 20, 22
Section 63 (a):
Clause 6 ..... 12, 15
Clause 6½ 12, 15
Clause 7 .....12, 15, 16, 22
Section 77B, sub-section (b)..... 7, 13
Act of January 18, 1934 ..... 7, 9
Bankruptcy Act:
Section 1 (11) 6, 7
Section 17 ..... 6, 7
Section 57 (n) 7
Section 63 (a) 7, 13, 14
Clause (1) 6, 17
Clause (2) 6, 17
Clause (3) 6, 17

	Page
Clause (4)	6, 17
Clause (5)	6, 17
Section 63 (b)	6
House Bill No. 5884 (73rd Congress)	22
House Report No. 194 (73rd Congress, First Session)	22
Judicial Code:	
Section 240-a as amended by Act of February 13, 1925 (U. S. C. Title 28, Section 347 (a))	1
Senate Report No. 482 (73rd Congress, Second Session)	22
Senate Report No. 1404 (73rd Congress, Second Session)	21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

Opinions Below.

No opinions were rendered by the Referee, the District Court, or the Circuit Court of Appeals for the Second Circuit.

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on June 20, 1934, and the

order for mandate filed on June 27, 1934 (R. 28). The jurisdiction of this Court is conferred, pursuant to Section 240 (a) of the Judicial Code (U. S. C. Title 28, Section 347 (a).)

The petitioner's writ of certiorari was granted by this Court on October 8th, 1934 (R. 29).

Statement of Facts.

A lease was entered into between the respondents, as landlord, and Sarnoff-Irving Hat Stores, Inc., the bankrupt, as tenant, dated November 7, 1925, wherein and whereby the respondents leased to the bankrupt certain premises at 102 Hanover Street, Boston, Massachusetts, for a term of ten years from January 1, 1926, at an annual rental of $6500 for the first five years of the term, and $7000 for the last five years, payable in equal monthly installments in advance (R. 4-11).

A voluntary petition in bankruptcy was filed by Sarnoff-Irving Hat Stores, Inc., in the United States District Court for the Southern District of New York, on August 27, 1932, and an order of adjudication in bankruptcy was entered on the same day. The petitioner thereafter duly qualified as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc.

The respondents filed a proof of claim in this bankruptcy proceeding within the statutory six month period, for the sum of $4418.04, of which $3452.76 represented alleged "liquidated damages" for breach of the said lease, and the balance, rent and other charges due at the time of the filing of the bankruptcy petition (R. 1-11). The claim for "liquidated damages" for breach of the lease was based upon the following covenant contained in the lease:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is

> agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 2)

The petitioner objected to the proof of claim (R. 1), and upon the hearing upon the petitioner's objections to the claim, the respondents moved for and obtained leave to file an amended proof of claim (R. 16-17). The amended proof of claim set forth the sum of $10,667.68 as the amount of the bankrupt's indebtedness to the respondents, of which $9018.98 represented alleged rent "deficiencies accruing subsequent to the date of the bankruptcy, less discounts", and the balance of $1648.70, rent and other charges due at the time of the filing of the bankruptcy petition (R. 11-14).

The memorandum of the Referee in Bankruptcy incorrectly states that the petitioner withdrew its objections to the claim (R. 17). The minutes of the hearing reveal that the petitioner admitted that the provability of that portion of the respondents' proof of claim relating to damages for breach of lease was governed by the decision of the Circuit Court of Appeals for the Second Circuit in *Irving Trust Co.* v. *A. W. Perry, Inc.*, 69 F. (2d) 90, and that the Referee was bound by the decision of the Circuit Court of Appeals to dismiss its objections to the claim, and *therefore* the only matter argued at the hearing was the application of respondents for leave to amend their

claim (R. 15-17). This error in the memorandum of the Referee was corrected by the order subsequently entered thereon by him, dated May 15, 1934, which states that the petitioner was heard "in support of the objections to the said claim" and decrees "that the objections filed by the Trustee in Bankruptcy herein, be and they hereby are dismissed." (R. 18.)

The covenant in the lease upon which this claim is based (except the portion thereof for $1648.70, representing rent deficiencies and electric charges with interest thereon due at the time of the filing of the bankruptcy petition) is precisely the same as the one contained in the lease in *Irving Trust Co., as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.*, v. *A. W. Perry, Inc.*, 69 F. (2d) 90, and the petitioner's petition to review the order of the Referee in Bankruptcy was denied by the District Court, per Coxe, D. J., with the following memorandum:

> "At the argument of this motion it was agreed by all counsel that the case was ruled by Outfitters Operating Realty Co. *vs.* Irving, recently decided by the C. C. A. in this Circuit (Certiorari granted by the Supreme Court) and the petition to review is therefore denied so that the question may, if possible, be presented to the Supreme Court at the time the Outfitters case is heard." (R. 23.)

A *pro forma* order of affirmance of this order was entered by the Circuit Court of Appeals for the Second Circuit (R. 28).

Question Presented.

Is a claim by a landlord for damages for breach of a lease of real estate, which has been uniformly held not provable in bankruptcy under Section 63 (a) of the Bankruptcy Act by this Court and the lower Federal courts, made provable by the inclusion in a lease of a provision for its automatic

termination upon the filing of a bankruptcy petition, and the recovery of damages in an amount equal to the rent reserved in the lease for the residue of the term, less the rental value of the premises for that residue?

Specification of Assigned Errors to be Urged.

That the Circuit Court of Appeals erred:

1. In affirming the decree of the District Court.

2. In holding that the item of damages, as set forth in the respondents' amended proof of claim, set forth a provable debt and should be allowed.

3. In holding that upon the filing of the bankruptcy petition a claim for damages arose under the provisions of the lease, which claim was provable in bankruptcy.

4. In holding that the clause in the lease, providing in substance that the filing of a petition in bankruptcy by or against the lessee should be deemed to constitute a breach of the lease and that thereupon, *ipso facto* and without entry or other action by the lessor, the lease should become and be terminated, and that upon such termination the lessor should be entitled to recover of the lessee damages in an amount equal to the amount of the rent reserved in the lease for the residue of the term, less the fair rental value of the premises for the residue of the term, was effective to entitle the lessor to prove in said bankruptcy for such damages.

5. In holding that the agreement in said lease, with respect to damages upon termination of said lease by the filing of a petition in bankruptcy, did not sound as a penalty rather than as liquidated damages.

Statutes Involved.

Section 63 of the Bankruptcy Act, as applicable to this case, provides:

> "Debts Which May Be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

> "'debt' shall include any debt, demand, or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * *,"

with exceptions not here material.

Section 57 (n) provides:

> "Claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication; * * *"

(Act of July 1, 1898, Sections 1, 17, 57 and 63; 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35, 93 and 103.)

Summary of Argument.

I.

It was pointed out by this Court in *Manhattan Properties* v. *Irving Trust Co., supra*, that the issue in determining whether or not a claim is provable is the *intent of Congress* in enacting the Bankruptcy Act. The amendments of June 7, 1934, and June 18, 1934, to the Bankruptcy Act, are legislative interpretations by Congress of its intent in enacting the original Bankruptcy Act of 1898.

The Act of Congress of June 7, 1934, adding to the bankruptcy Act Section 77B, Sub-section (b) of which provides for the treatment of a claim of a landlord for damages or indemnity under a lease covenant, "on a parity with debts which would be provable under Section 63 (a)", and amending Section 63 (a) by the addition of Clause (7), providing for the proof by a landlord of a claim for rent and for damages or indemnity under a lease covenant in a limited amount, indicate that Congress regarded such claims for damages under lease covenants as not originally provable under Section 63 (a).

The amendment of June 18, 1934, amending Clause (7) enacted on June 7, 1934, by limiting the pending estates, to which Clause (7) was applicable, to those "in which the time for filing such claims has not expired", in order to

obviate the inconvenience, expense and confusion which would result from having the clause made applicable to all pending estates, is further conclusive evidence that Congress recognized claims such as the one in the instant case as not having been originally provable under Section 63 (a).

II.

The basis for the denial of proof to the claims in *Manhattan Properties, Inc.*, v. *Irving Trust Co.*, and in the decisions of the lower Federal courts therein adverted to, was not the verbiage employed in the covenants in the leases upon which the claims were filed, but the nature of the claims. The same contingencies which bar the claim for future rent are also present in a claim for damages for breach of lease, in that the measure of damages is necessarily based upon the rent reserved in the lease, the accrual of which is contingent.

III.

The damage clause contained in the covenant of the lease upon which the claim is based is penal in nature and therefore unenforcible. The damage clause, moreover, is not only speculative, but requires the making of an impossible calculation.

ARGUMENT.

I.

The controlling factor in determining the provability of claims is whether Congress intended them to be provable. The amendments to the Bankruptcy Act of 1934 are legislative interpretations of the intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act of 1898. These amendments conclusively demonstrate that it was not the intent of Congress in enacting the original statute that a claim such as the present one be provable in bankruptcy.

It has recently been held by this Court in *Manhattan Properties* v. *Irving Trust Co.* and *Brown v. Irving Trust Co.*, 291 U. S. 320, that a claim for damages for breach of covenant contained in a lease of real property is not provable. The covenants in the leases in those cases, upon which the claims were sought to be proven, provided:

In the Manhattan Properties case—

That in the event of the institution of bankruptcy proceedings by or against the tenant, the landlord might without notice re-enter the premises, and after obtaining possession, relet as agent for the tenant for the whole or any part of the term, and from time to time, and:

> "The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless

> the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

In the Brown case—

That on default by the lessee, or if it should be adjudicated a bankrupt, the lessor might enter and repossess the premises.

> " • • • and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

The same situation is again presented in this case, and in *Perry* v. *Irving Trust Co.*, 69 F. (2d) 90, which is being argued together with this case, the question being whether the difference in verbiage employed in the covenant of the present lease removes the case from the principle of *Manhattan Properties* v. *Irving Trust Co.* and *Brown* v. *Irving Trust Co., supra.* The clause in the lease containing the covenant upon which the proof of claim in this case is based reads:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, (or either or any of them,) shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be

terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover (of the Lessee and each of them) damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the (demised) premises for the residue of said term." (R. 12.)

(The clause in the Perry case reads identically the same, except that the words in parentheses are omitted.)

This Court in *Manhattan Properties* v. *Irving Trust Co.*, and *Brown* v. *Irving Trust Company, supra*, recognized that the determining factor in permitting or denying proofs of claim in bankruptcy, was not the words employed in the statute, nor was it the verbiage of the covenants of the lease, *but rather the intent manifested by Congress in enacting the Bankruptcy Statute*, stating at pages 332, *et seq:*

"The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act. The construction for which the petitioners contend is, as a matter of logic, an admissible one. But that construction is contrary to the great weight of authority as to the effect of similar provisions in earlier Acts, and § 63 of the present Act. • • •

"After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors*, 251 U. S. 239, 250, 44 Am. B. R. 547, 38 S. Ct. 578, 64 L. Ed. 247), Congress adopted the Act now in force, that of July 1, 1898. The committee reports do not disclose the origin of the phraseology of § 63, nor discuss the classes of claims intended to be included. But it is clear that Congress was familiar with analogous sections of the earlier acts and the court decisions interpreting them, and with the text of the Lowell Bill and the English act then in force. In view of the extended consideration

and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra,* pp. 250, 251.

"Soon after the passage of the Act several federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under section 63. • • •

"In accord with the well-nigh unanimous view of the federal courts reiterated for over thirty years are statements of leading text writers. *Collier, Bankruptcy,* 13th Ed., Vol. 2, p. 1422; *Remington, Bankruptcy,* Vol. 2, §§ 789, 793; *Loveland, Bankruptcy,* Vol. 1, § 313.

"What of the activities of the Congress while this body of decisions interpreting section 63a, was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 368, 372.

"*In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' Maynard* v. *Elliott, supra,* 277. *If the rule is to be changed Congress should so declare.*" (Italics ours.)

Congress did change the rule (the effective date of the change, however, was subsequent to this case), and permitted the proof of claims in bankruptcy by landlords in a limited amount. These changes were effected by the enactment of a new section to the Bankruptcy Act, relating to the reorganization of corporations, known as Section 77B, and by adding Clauses (6), (6½) and (7) to Section 63 (a). *These amendments to the Bankruptcy Act are legislative interpretations by Congress of its intent in originally en-*

acting Section 63 (*a*). *Cope* v. *Cope,* 137 U. S. 682; *Dunbar* v. *Dunbar,* 190 U. S. 340; *Wetmore* v. *Markoe,* 196 U. S. 68. As stated by this Court in *Cope* v. *Cope, supra:*

> "These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, *but the later Acts should also be regarded as legislative interpretations of the prior ones. United States* v. *Freeman,* 44 U. S. 3 How. 556, 564 (11: 724, 727); *Stockdale* v. *Atlantic Ins. Co.,* 87 U. S. 20 Wall. 323 (22: 348)." (691) (Italics ours.)

The addition of Section 77B to the Bankruptcy Act and the amendments to Section 63 (a) of the Act were enacted on June 7, 1934, subsequent to this Court's decision in *Manhattan Properties, Inc.,* v. *Irving Trust Co., supra.*

A. *The intent of Congress in originally enacting Section* 63 (*a*) *of the Bankruptcy Act, as legislatively interpreted by it in enacting Section 77B, sub-section* (*b*), *on June* 7, 1934.

Section 77B relates only to the reorganization of corporations, but the wording of sub-section (b) thereof is conclusive of Congress' intent in originally enacting Section 63 (a), that a claim such as the present one be not provable thereunder. This sub-section reads:

> "In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. *The claim of a land-*

> *lord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section* 63 (*a*) *of this Act,* but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of re-entry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or re-entry. * * *'' (Italics ours.)

This sub-section permits the filing of all claims provable under Section 63 (a), *plus* "the claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease." By providing that a claim of a landlord for damages for breach of a covenant contained in a lease "shall be treated as a claim ranking on a parity with debts which would be provable under Section 63 (a)," *Congress expressly interpreted claims by a landlord for damages for breach of covenant contained in a lease as not being provable under Section* 63 (*a*).

The amended proof of claim in this case is admittedly for "liquidated damages for breach of covenant contained in said indenture of lease" (R. 12), and in enacting Section 77B of the Bankruptcy Act, Congress legislatively interpreted such a claim as being not provable under Section 63 (a). *Cope* v. *Cope, supra.*

B. *The intent of Congress in originally enacting Section* 63 (*a*) *of the Bankruptcy Act as legislatively interpreted by it in amending Section* 63 (*a*) *on June 7th,* 1934, *and by the further amendment of June* 18*th,* 1934:

The amendment of June 7, 1934, to Section 63 (a) of the Bankruptcy Act dealt with the provability of three classes of claims:

1. Workmen's Compensation claims (Clause 6);

2. Tort claims based upon negligence where an action was instituted prior to the bankruptcy adjudication, although not reduced to judgment at the time of adjudication (Clause 6½); and

3. Claims for future rent, damages and indemnity under covenants contained in leases of real estate (Clause 7).

These clauses provide:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; (6½) the amount of any damages, as evidenced by a judgment of a court of competent jurisdiction, in any action for negligence instituted prior to adjudication of defendant in such action in bankruptcy and pending at the time of the filing of petition in bankruptcy, whether voluntary or involuntary; and (7) *claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date:* Provided, That

> the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided, further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act." (Italics ours.)

The *question presented* is whether these amendments to to Section 63 (a) were merely declaratory of the law as it existed prior to their passage, or whether these amendments added to the classes of claims which were originally provable under Section 63 (a), and provided for the proof of claims not theretofore provable. The amended proof of claim in the instant case, which is for "liquidated damages for breach of covenant" contained in a lease of real estate (R. 12), is obviously included in the class of claims mentioned in Clause (7), and in the event that these amendments to Section 63 (a) were intended by Congress as *changes* in the law and *additions* to the class of claims theretofore provable, it necessarily follows that *Congress in enacting these amendments interpreted this claim as not having been provable under Section* 63 (*a*), *as it read prior* to these amendments.

That Congress intended the amendments of June 7, 1934 to Section 63 (a) of the Act as *changes* in the law, and *additions* to the class of claims then provable under the Section, and did not intend the amendments as being merely declaratory of the existing law, appears from

(1) The frame of the amendments to Section 63 (a) of June 7th, 1934;

(2) The Act of June 18, 1934 amending Clause (7) enacted June 7, 1934; and

(3) The proceedings in Congress preceding the enactment of the Act of June 7, 1934.

(1) *The frame of the amendments to Section* 63 (*a*) *of June* 7, 1934:

Section 63 (a) before the amendments of 1934 contained five separate and distinct clauses, consecutively numbered from 1 to 5, each providing for the proof in bankruptcy of a separate class of claims. In order to constitute a provable claim it is not necessary that the obligation contain all of the characteristics mentioned in the five clauses, but only the characteristics specified in any one of the clauses. As this Court pointed out, in allowing proof of a claim against bankrupt endorsers of unmatured promissory notes:

> "That section (63) purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former."
>
> *Maynard* v. *Elliott*, 283 U. S. 273, 277.

This Court refused to read into Clause (4) *of Section* 63 (*a*) *the limitation of Clause* (1).

The amendment of June 7, 1934, added to Section 63 (a) another clause (7) containing a limitation—that "the claim of a landlord for injury resulting from the rejection by the Trustee of an unexpired lease of real estate, or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises, plus an amount equal to the unpaid rent accrued up to said date." The limitation of Clause (7) can no more be read into Clause (4) of Section 63 (a) than could the limitation of Clause (1). Then what does Clause (7) limit? Ob-

viously, *only those claims which are made provable by Clause* (7).

That Congress in enacting Clause (7) intended to place all claims by landlords for rent or for damages or indemnity under lease covenants upon the same basis cannot be questioned. But if the claim in the instant case is provable under Clause (4), the effect of Clause (7) is to create two different classes of landlords' claims for damages or indemnity:

1. Claims provable under Clause (4), which despite the addition of Clause (7) would still be provable in unlimited amount, as the limitation of Clause (7) cannot be read into Clause (4); and
2. Claims provable under Clause (7) which will be provable only in the limited amount.

Obviously Congress intended no such distinction.

Had Congress recognized that certain types of landlords' claims for damages or indemnity under lease covenants were provable under Clause (4), it would have incorporated in Clause (7) only the words necessary to make all such claims provable, and provided for the limitation in a new sub-division (c) of Section 63, which would be applicable to all claims enumerated in sub-division (a).

It can hardly be assumed that Congress was not mindful of the frame of the section, and "mistakenly" enacted the amendment in its present form. The enactment having been made in the present form is indicative of but one thing—*that Congress never intended that any claim by a landlord for damages or indemnity under lease covenants* be provable under section 63 (a) (4).

But *we have still further evidence* from the amendment of June 7, 1934, that Congress never regarded such claims as being provable under Section 63 (a). Clauses

(6) and (6½) which were added to Section 63 (a) at the same time as Clause (7), beyond question permitted the proof of claims which were theretofore not provable. Workmen's Compensation claims which are made provable by Clause (6) were stated to be not provable in *Lane* v. *Industrial Commissioner*, 54 F. (2d) 338, 342 (*Certiorari Denied on Jurisdictional Grounds*, 286 U. S. 543). (Tort claims for negligence are made provable by Clause (6½) where an action was instituted prior to the filing of the bankruptcy petition, although not reduced to judgment until subsequent to that time. Prior to the enactment of this clause, such claims were provable only where reduced to judgment prior to the filing of the bankruptcy petition. *Schall* v. *Camors*, 251 U. S. 239.

It was hardly the intention of Congress in adding three new clauses to this Section, to have two of them, Clauses (6) and (6½) change the existing law, and the third Clause (7) merely declare that law. This, all the more so, in view of the fact that Clause (7) specifically permits the provability of future rent claims which were held by this Court to be non-provable prior to the amendment in *Manhattan Properties, Inc.*, v. *Irving Trust Co., supra.*

The enactment of Clause (7) was caused by the necessity for relief to landlords whose corporate tenants filed bankruptcy petitions. The filing of these petitions resulted not only in the loss by the landlord of the benefits of the lease, but prevented him from sharing in the distribution of the bankrupt's assets for the damage suffered by him consequent upon the breach of the lease. To assume that Clause (7) was declaratory of the law in that damages under a covenant contained in a lease of real estate were provable prior to its enactment, would lead to a result exactly contrary to that intended by Congress in enacting the amendment—*that claims were formerly provable by a landlord*

for damages under a covenant in a lease of real estate in unlimited amount, and that since the effective date of Clause (7) such claims may only be proven in an amount equal to "the rent reserved by the lease without acceleration for the year next succeeding the date of the surrender of the premises, plus an amount equal to the unpaid rent accrued up to said date." Obviously it was not the intention of Congress to impose further hardships upon landlords and to limit claims which were formerly provable by landlords.

Congress clearly intended in enacting Clause (7) to provide for the proof of a new class of claims not theretofore provable—claims for future rents and damages and indemnity under covenants in leases, but limited as to amount. By limiting the amount for which such claims could be proven, Congress clearly indicated that those claims were not theretofore provable, as the purpose of the amendment was to enlarge and not limit the rights of landlords.

(2) *The Act of June 18, 1934, amending Clause (7) enacted June 7, 1934:*

The latter part of Clause (7), as enacted by Congress in the Act of June 7, 1934, reads, *"provided further that the provisions of this Clause (7) shall apply to estates pending at the time of the enactment of this amendatory act."* By Act of June 18, 1934 the words *"in which the time for filing such claims has not expired"* were added to that provision, so that it now reads as amended *"provided further that the provisions of this Clause (7) shall apply to estates pending at the time of the enactment of this amendatory act, in which the time for filing such claims has not expired."*

The reason for the addition of the words *"in which the time for filing such claims has not expired"* by Act of June

18, 1934, is set forth in the report of the Senate Judiciary Committee (Senate Report 1404, 73rd Congress, Second Session).

> "The committee is of the opinion that the provisions of clause (7), quoted above, should be limited in operation to those estates in which the time for filing claims has not expired. If applied to estates in which the time for filing claims has expired, these provisions would entail much inconvenience, expense, and confusion, in many cases necessitating the reopening of estates which are ready for final settlement and in which the time for filing claims expired many months ago. The sole purpose of this bill (S. 3779) is to avoid such undesirable results of the provisions of clause (7)."

It is obvious that a statute enlarging the class of claims provable in bankruptcy would result in great inconvenience and confusion, if it affected estates in which the time for filing claims had expired. If this statute were made applicable only to those pending cases in which the time for filing claims had not expired, the administration of bankrupt estates would not be in any wise affected.

But suppose the statute did not enlarge the class of claims provable, but limited in amount claims which were formerly provable. Such a statute would result in confusion if applied to *any* pending cases. Although the time for the filing of claims may not have expired, dividends may have been paid. The task of securing the return of dividends already paid to landlord creditors would in many cases prove not only difficult but impossible. In any event, the limitation of the application of such a statute to pending cases in which the time for the filing of claims had not expired, would serve no useful purpose. It would not eliminate confusion resulting from such a statute being made applicable to pending cases.

If Clause (7) amended Section 63 (a) by limiting in amount claims formerly provable thereunder, Congress in amending the Clause within two weeks of its enactment, to eliminate inconvenience, expense and confusion resulting from the operation thereof, would have limited the application of the Clause to future estates, as the limitation to pending estates in which the time for the filing of claims has not expired would not attain the desired result.

But this result would be attained by limiting the application of the Clause to pending estates in which the time for the filing of claims has not expired, *if the Clause was not a limitation to Section 63 (a), but an enlargement of the class of claims provable.* Since the amendment of June 18, 1934 enacted for the purpose of eliminating inconvenience, expense and confusion in the operation of Clause (7), would have that result only in the event that the clause enlarged the class of provable claims, it follows that the clause must have been intended by Congress as an enlargement of the class of claims provable, and not a limitation.

(3) *The proceedings in Congress preceding the Act of June 7, 1934:*

The verbiage of Clause (7) of the Amendments of June 7, 1934, was revised several times before the final passage of the clause in its present form, as an amendment to Section 63 (a). But a Clause (7) covering the same subject matter, although differently worded, was included in the bill originally introduced in the House of Representatives (H. R. 5884), amending Section 63 (a) of the Bankruptcy Act, which was entitled *"Changes in Existing Law"* (House Report 194, 73rd Congress, First Session). This report of the House of Representatives was reprinted in Senate Report 482 (73rd Congress, Second Session).

Clause (7) as it was originally worded in House Bill 5884, read:

> "(7) Claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under Section 63b of this Act."

Clause (7) as finally worded is similar in context, covering the same subject matter—claims for future rents and damages for breach of lease—and the entitlement by Congress of the proceedings pursuant to which the clause was added to the Bankruptcy Act as *"Changes in Existing Law"* conclusively proves that Congress regarded the clause as not being declaratory of the law, *but as changing the law.*

Point II.

This Court in Manhattan Properties v. Irving Trust Co., supra, affirmed the doctrine long established by the lower Federal courts that claims for rent or damages consequent upon the abrogation of leases are not provable in bankruptcy. This doctrine is based not upon the language employed in the leases but the essential nature of such claims.

This Court in *Manhattan Properties* v. *Irving Trust Co., supra,* pointed out that the decisions of the Federal courts uniformly held that claims for loss of rent, or for damages consequent on the abrogation of leases, were not provable under Section 63 (p. 335). The basis of the principle preventing the proof of such claims lies in the distinction between covenants affecting realty and personalty.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, the Chicago Auditorium Association granted to the bankrupt the baggage and livery privilege of the Auditorium Hotel for a term of five years, for a stipulated consideration, payable monthly. At the time of the filing of

the bankruptcy petition the contract was in full force and effect, and neither party was in default. This Court held the Chicago Auditorium Association to have a provable claim in bankruptcy, giving the filing of the bankruptcy petition the effect of an anticipatory breach of contract. The importance of this often cited decision lies in the distinction therein made with respect to contracts dealing with relationship of landlord and tenant, this Court having stated at page 590:

> "besides which a number of cases arising out of the relation of landlord and tenant are cited: *Re Ells,* 98 Fed. 967; *Re Pennewell,* 55 C. C. A. 571, 119 Fed. 139; *Watson* v. *Merrill,* 69 L. R. A. 719, 69 C. C. A. 185, 136 Fed. 359; *Re Roth,* 31 L. R. A. (N. S.) 270, 104 C. C. A. 649, 181 Fed. 667; *Colman Co. v. Withoft,* 115 C. C. A. 222, 195 Fed. 250. *Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the mere personalty,'* Co. Litt. 292, b, § 513." (Italics ours.)

This distinction was again adverted to by this Court in *Gardner* v. *Butler & Co.,* 245 U. S. 603, at page 605:

> "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

The rent covenant is totally different from covenants relating to personalty, the nature of this covenant being well set forth in *Re Roth & Appel,* 181 Fed. 667 (referred to by this Court in *Manhattan Properties* v. *Irving Trust Co., supra*), in the following language:

> "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time

stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in præsenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent. *Watson* v. *Merrill*, 136 Fed. 362, 69 C. C. A. 185, 69 L. R. A. 719. See, also, Coke on Littleton, 292b; *Wood* v. *Partridge*, 11 Mass. 492; *Bordman* v. *Osborn*, 23 Pic. (Mass.) 299." (669.)

The nature of the rent covenant which prohibits the proof of a claim for future rent likewise prohibits the proof of a claim for damages for breach of a lease of real estate. Whether or not any damage will be suffered by the landlord by reason of the breach of the lease is contingent upon the accrual of the rent days specified in the lease—the same contingency which bars the proof of a claim for future rent.

Or to put it differently:

The damage suffered by a landlord by reason of the breach of a lease by the tenant is the loss of future rents. This loss would be suffered by the landlord only in the event that the rent reserved in the lease to be paid in the future should actually become due. Whether this rent would ever accrue and become due is dependent upon the arrival of the rent days specified in the lease—the contingency which bars the proof of a claim for future rent. This contingency which bars the proof of a claim for future

rent likewise bars the proof of a claim for damages for breach of lease.

The use of the words "that the filing of any petition in bankruptcy * * * shall be deemed to constitute a breach of this lease, and thereupon *ipso facto* * * * this lease shall become and be terminated, and * * * the lessor shall * * * recover * * * damages for such breach in an amount equal to the amount of the rent reserved in this lease, for the residue of the term hereof, less the fair rental value of the demised premises for the residue of the said term," (R. 12) in the instant lease, in no wise affects the nature of the claim presented. In *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* and in the cases there collated at page 335, (after the statement "soon after the passage of the Act several Federal courts were called upon to decide the question (the provability of claims for loss of rent or for damages consequent on the abrogation of leases), and they uniformly held such claims were not provable debts under § 63"), the claims were all based in fact upon an estimation of the landlord's loss of future rent—the difference between the rent reserved in the lease to the end of the term, and the rental value for the same period. *The claim filed in the instant case is for exactly the same thing.* The determining factor governing the proof of claims in bankruptcy is the nature of the claim sought to be proved—and not the words employed in creating the obligation which affords the basis for the claim. As stated in *Watson* v. *Merrill,* 136 Fed. 359 (C. C. A. 8):

> "It is, however, the nature of the claim, and not the name which is applied to it, that conditions its provability in bankruptcy." (360.)

It is the fact of the distinction between the nature of covenants relating to real property and personal property, which has uniformly barred the proof of claims for rent,

and damages and indemnity based upon the abrogation of leases of real estate, and not any particular language employed in the leases. The nature of the claim in the instant case is identical with that in *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* the difference of verbiage employed in the leases in the respective cases having in no wise affected the nature of the claims. The claim in the instant case is for damages for breach of a covenant in the lease, as was the one in *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* and is therefore not provable.

Point III.

The prescribed measure of damages is impossible of calculation and sounds in penalty.

The damage clause contained in the covenant of the lease upon which the proof of claim is based provides for the following measure:

> "* * * an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 12.)

This measure of damages was specifically held too speculative for proof in bankruptcy by the court below in *Re Metropolitan Chain Stores, Inc., Malavazos* v. *Irving Trust Co.,* 66 F. (2d) 482, the court having stated at page 484:

> "But a second ground taken for holding the claim too contingent for proof in bankruptcy was the uncertainty whether there would be any loss in rents. That uncertainty exists equally here. The measure of damages for failure by a lessee to accept a lease for which he had contracted is presumably the difference between the rent stipulated in the lease and rent obtainable from other parties if the premises are relet. See *Addieg* v. *Tull,* 187 F. 101, 103 (C. C. A. 2); 3

Williston, Contracts, § 1405. In the case at bar the original term was not to begin until January 1, 1935, and was to run for thirty years thereafter. Whether during that distant period the landlord will profit or lose by reason of the prospective tenant's repudiation of his contract (assuming without decision that bankruptcy may be deemed such) is *pure speculation.* Cf. *Dunbar* v. *Dunbar,* 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084; *Hermitage Co.* v. *Levine,* 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015." (Italics ours.)

In *Perry* v. *Irving Trust Co., supra,* the case being argued together with the present one, the court recognized the argument against the proof of the claim, stating at page 91:

"The argument contra may be stated as follows: If bankruptcy be an anticipatory breach, as it is, then, in a case where the lessee has promised to pay the loss, the promise or the whole series of promises, is repudiated at once. To calculate the damages, as in the case of other anticipatory breaches, the value of the consideration restored—in this case the land—will be presently estimated by the best means accessible. The result is exactly the measure to which the parties have themselves agreed in the covenant at bar. If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is there not when there is?"

And then went on to answer this argument by saying:

"This argument loses sight of the real objection to allowing the claim when damages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be manageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast and a forecast in these circumstances will not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. It is the uncertainty in fact of the loss that invalidates the claim;

> that is not remedied by an approximation which the law will accept in other connections. But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable. The only question is whether that promise is lawful, whether it makes a contract, and as to that we have it on the highest authority that it liquidates 'the damages upon a footing familiar and fair.' *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 602, 38 S. Ct. 211, 62 L. Ed. 497."

But is this measure of damages held purely speculative in *Re Metropolitan Chain Stores, Inc., supra,* any the less speculative because the parties expressly agreed to it? Can this measure which is not applicable in bankruptcy, when impliedly agreed upon, form the basis of a provable claim because expressly agreed upon? It is most illogical to assume that the Bankruptcy Court will speculate as to the amount of the claimant's damage merely because the claimant and bankrupt agreed upon a speculation being made, especially in view of the fact that the rights of all the other creditors who did not consent to such speculation, would be affected thereby.

The tenant had nothing to lose by consenting to such a speculation, as the payment would be made out of assets of its bankrupt estate, and the loss suffered by its creditors. As stated by this Court in *Kothe* v. *Taylor Trust,* 280 U. S. 224, 226:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the

> amount of the claim to be presented; most probably that would affect only those entitled to share in the proceeds of property beyond his control."

This measure of damages is all the more speculative by reason of the provisions in the lease terminating the period of the demise prior to the expiration date mentioned therein, in the event of the destruction of the premises by fire or other unavoidable casualty, or in the event of the condemnation of the premises by the city or other authorities (R. 8). *The "residue of the term" of the lease is indeterminate.* One of these contingencies set forth in the lease might occur the day following the filing of the bankruptcy petition, in which event "the residue of the term" would be one day.

This situation is very similar to that presented in *Dunbar* v. *Dunbar,* 190 U. S. 340, where a claim based on an alimony agreement to pay a stipulated sum "during her life, or until she marries", was denied proof in bankruptcy, this Court stating:

> "But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency?" (p. 345.)

The possibility of the demised premises being destroyed by fire or other unavoidable casualty or of its being taken in condemnation proceedings, can no more be calculated than the continuance of widowhood. Since the "residue of the term" could not be ascertained at the time of the filing of the bankruptcy petition, *the prescribed measure of damages is impossible of calculation.*

The stipulated measure of damages is penal in effect and therefore unenforcible.

> "Generally whenever the damages flowing from a breach of contract can be easily established or where the damages fixed are plainly disproportionate to the injury the stipulated sum will be treated as a penalty. So where a strict construction would result in absurdity. There must be some attempt to proportion these damages to the actual loss. The parties must not lose sight of the principle of compensation."
>
> *Seidlitz* v. *Auerbach,* 230 N. Y. 167, 173.

There was no attempt made in the preparation of the damage clause in the instant lease to apportion the damage to the actual loss. The court below in *Irving Trust Co.* v. *Perry, supra,* recognized this defect in the clause, stating at page 92:

> "* * * but there is one doubt that does arise; whether the clause is for a penalty because the future payments are not discounted to their present values. If the lessee must pay at once the sum of a series of installments, each consisting of the difference between the rent reserved on successive rent days, and the estimated rent which will have been received on those days, the recovery will surely be more than compensatory. The present value of such an installment, payable twenty years hence, is very much less than its face. Whether this would invalidate the whole clause under *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, 50 S. Ct. 142, 74 L. Ed. 382, we need not say, because we think that the lease should not be read in that way."

The court then went on in an attempt to remedy this defect:

> "Were a lease to be sold nobody would think of valuing it so; he would discount the future payments. The meaning is indeed doubtful, but as we are not bound to view the language with a hostile eye, we shall construe it to save the clause, and we therefore

> hold that the proper measure of damage is the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period. We need not therefore decide whether if future installments were payable at their face the clause would be void as a penalty."

But the court did not have the power to make over the contract of the parties. It could not supply the omission in the clause relative to the discounting of the future payments in order to avoid the penal nature of the provision. *Hermitage* v. *Levine,* 248 N. Y. 333 (opinion by Mr. Justice Cardozo, then Chief Judge). The measure of damage stipulated in the lease was plainly disproportionate to the injury and constituted an unenforcible penal provision. *Kothe* v. *Taylor Trust, supra.*

Point IV.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, and the proof of claim of the respondents reduced to the sum of $1,648.70, representing the rent deficiencies and electric charges, with interest thereon due at the time of the filing of the bankruptcy petition.

Respectfully submitted,

IRVING L. ERNST,
LESTER D. MELZER,
Counsel for Petitioner.